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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/559,629	12/06/2005	Hideaki Kobayashi	126132	2792

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EXAMINER	
PADEN, CAROLYN A	

ART UNIT	PAPER NUMBER
1794	

MAIL DATE	DELIVERY MODE
01/27/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/559,629	KOBAYASHI ET AL.	
	Examiner	Art Unit	
	Carolyn A. Paden	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *21 September 2006*.

2a)☐ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-26* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-22 and 24-26* is/are rejected.

7)☒ Claim(s) *23* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Claims 2, 6-14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 2 contains the recitation PLA, which appears to be the abbreviation for phospholipase A (page 5 of the specification). An amendment to the claims inserting -(phospholipase A)- after PLA in claim 2 would describe what is intended by the recitation PLA.

The process claims are in the passive voice and it is unclear what particular steps are meant in the process. An amendment to the claims converting them to the active voice would overcome the rejection.

In claims 7 and 8 the recitation and/or is confusing because it is unclear if the lysophospholipid is included or not. An amendment to the claims cancelling one tern or the other would overcome the rejection.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-26 are provisionally rejected under 35 U.S.C. 103(a) as being obvious over copending Application No. 10/559677, which has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the copending application, it would constitute prior art under 35 U.S.C. 102(e) if published or patented. This provisional rejection under 35 U.S.C. 103(a) is based upon a presumption of future publication or patenting of the conflicting application.

The co-pending application is directed to a food product containing a plant sterol and an egg yolk lipoprotein. The food product would be expected to include an emulsion. The process of making the complex would appears to be the same process as what is used in the present application.

This provisional rejection might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the copending application was derived from the inventor of this application and is thus not the invention "by another," or by a showing of a date of invention for the instant application prior to the effective U.S. filing date of the copending application under 37 CFR 1.131. This rejection might also be overcome by showing that the copending application is disqualified under

35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(l)(1) and § 706.02(l)(2).

Claims 1 and 6 are rejected under 35 U.S.C. 102(b) as being anticipated by Corliss (6,113,972) and see examples.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 3, 6-22 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Corliss (6,113,972).

Corliss discloses a phytosterol protein complex (abstract). Defatted egg yolk it used as a protein source in the examples. Although lipoprotein is not mentioned in Corliss, one of ordinary skill in the art would expect the protein in Corliss to include lipoprotein. In example 3 the product is made by preparing the egg proteins (example 1), dissolving the egg protein in water, combining lauric acid with phytosterol at 60C and mixing the egg

protein with the lauric acid/phytosterol solution. The mixing process would be expected to emulsify the composition. In example 5 the final produce it a white liquid. The phytosterol would be expected to be in the form of a solid or powder because it is dissolved in example 3. The claims appear to differ from Corliss in the recitation that the emulsion formed is oil in water emulsion. Both oil and water are present in the composition. One of ordinary skill in the art would expect the composition of Corliss to be an emulsion that is oil in water emulsion because of the composition of the product. It is appreciated that the particle size of the plant sterol used is not mentioned but Corliss forms a powdered composition from a flaked product in example 4. To alter the particle size in Corliss would have been within the abilities of one of ordinary skill in the art.

Claims 1-5, 15-21, 24-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kawai (7,041,328 or 6,635,777 or WO 00/78162 pr 7,160569).

The three Kawai references and the Kudou reference appear to be similar to one another. The Kawai '777 reference will be specifically discussed in this rejection. Kawai discloses oil in water emulsifier composition containing diglycerides and egg yolk (abstract). Egg yolk is

treated with phospholipase A to form an enzyme treated egg yolk with lyso-phospholipid. At column 3, lines 49-60, phytosterols are included in the composition to provide a phytosterol content of up to 10%. Mayonnaise is prepared in test 1.

The claims appear to differ from Kawai in the recitation of egg lipoprotein but since whole egg is used in the processing steps, one of ordinary skill in the art would expect the egg yolk to contain lipoprotein. It would have been obvious to one of ordinary skill in the art to use the egg product of Kawai as the egg lipoprotein complex of the claims. It is appreciated that "low calorie" is not mentioned but one of ordinary skill in the art would be able to adjust the calories of Kawai according to the extent of caloric reduction desired. As to tartar sauce, one would be expected to be able to formulate tartar sauce from the mayonnaise produced by Kawai .

Claim 23 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Jackesehky (5948463, 6177120, ;

5780095) and Tobita (6660312) are further cited to show enzyme treated egg yolk containing lysophospholipids along with phytosterols.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794